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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 SARAH ANGELINA THOMAS,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting  
13 Commissioner of Social Security,

14 Defendant.

CASE NO. C17-1350-MAT

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

15 Plaintiff Sarah Angelina Thomas proceeds through counsel in her appeal of a final decision  
16 of the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
17 denied Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance  
18 Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the  
19 ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is  
20 REVERSED and REMANDED for further administrative proceedings.

21 **FACTS AND PROCEDURAL HISTORY**

22 Plaintiff was born on XXXX, 1975.<sup>1</sup> She has a high school diploma, and has worked as a

23 <sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 business manager, receptionist, and paralegal. (AR 320-21.)

2 Plaintiff applied for SSI and DIB in November 2013. (AR 292-304.) Those applications  
3 were denied and Plaintiff timely requested a hearing. (AR 155-63, 165-77.)

4 On October 20, 2015, ALJ Glenn G. Meyers held a hearing, taking testimony from Plaintiff  
5 and a vocational expert (VE). (AR 38-75.) On May 4, 2016, the ALJ issued a decision finding  
6 Plaintiff not disabled. (AR 15-31.) Plaintiff timely appealed. The Appeals Council denied  
7 Plaintiff's request for review on July 27, 2017 (AR 1-6), making the ALJ's decision the final  
8 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this  
9 Court.

### 10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining  
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not  
16 engaged in substantial gainful activity since January 7, 2014, the alleged onset date. (AR 17.) At  
17 step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ  
18 found severe Plaintiff's seizure disorder, diabetes mellitus, diabetic retinopathy, history of right  
19 eye laser surgery, depressive disorder, anxiety disorder, substance abuse in remission, headaches,  
20 and post-traumatic stress disorder. (AR 17-18.) Step three asks whether a claimant's impairments  
21 meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet or  
22 equal the criteria of a listed impairment. (AR 18-20.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has  
2 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of  
3 performing light work with additional restrictions. She can perform simple, repetitive tasks in  
4 two-hour increments. She can have superficial, incidental contact with the public. She can work  
5 in proximity to, but not in coordination with co-workers. She can have occasional contact with  
6 supervisors. She would be off-task at work up to 10% of the time, but still meet minimum  
7 production requirements. She would be absent one day per month. She can frequently engage in  
8 activities requiring depth perception. The claimant must avoid working at unprotected heights.  
9 She can never balance or drive. She can never work in hazardous conditions, such as around  
10 moving machinery. (AR 20.) With that assessment, the ALJ found Plaintiff unable to perform  
11 past relevant work. (AR 29.)

12 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to  
13 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
14 adjustment to work that exists in significant levels in the national economy. With the assistance  
15 of the VE, the ALJ found Plaintiff capable of transitioning to other representative occupations,  
16 including bottle packer; production assembler; and assembler, electrical accessories I. (AR 30-  
17 31.)

18 This Court's review of the ALJ's decision is limited to whether the decision is in  
19 accordance with the law and the findings supported by substantial evidence in the record as a  
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
21 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
22 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
23 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's

1 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
2 2002).

3 Plaintiff argues the ALJ erred in (1) finding at step three that she did not meet Listings 9.00,  
4 12.04, or 12.06; (2) assessing certain medical evidence and opinions; (3) discounting her own  
5 testimony; (4) rejecting statements written by Plaintiff's daughter; and (5) failing to account for  
6 her seizures when assessing her RFC. The Commissioner argues that the ALJ's decision is  
7 supported by substantial evidence and should be affirmed.

### 8 Step three

9 Plaintiff argues that the ALJ erred in finding that she did not meet Listings 9.00, 12.04, and  
10 12.06. Plaintiff notes that treating physician Megan Wilson, M.D., opined that she satisfied these  
11 listings, and contends that the ALJ erred in rejecting Dr. Wilson's opinion.

12 At step three, the ALJ considers whether one or more of a claimant's impairments meet or  
13 medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. "The listings  
14 define impairments that would prevent an adult, regardless of his age, education, or work  
15 experience, from performing *any* gainful activity, not just 'substantial gainful activity.'" *Sullivan*  
16 *v. Zebley*, 493 U.S. 521, 532 (1990) (emphasis in original; citations omitted). Plaintiff bears the  
17 burden of proof at step three. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). To meet a listing,  
18 an impairment "must meet *all* of the specified medical criteria." *Sullivan*, 493 U.S. at 530  
19 (emphasis in original).

20 Dr. Wilson indeed opined that Plaintiff's diabetes met Listing 9.00 and that her mental  
21 disorders satisfied Listings 12.04 and 12.06. (AR 1022.) Dr. Wilson stated conclusorily that  
22 Plaintiff's "constellation of impairments" causes marked impairments in her social functioning  
23 and her ability to maintain concentration, persistence, and pace, which are relevant to Listings

1 12.04 and 12.06. (AR 1022-23.) Dr. Wilson did not specify what evidence supported that  
2 conclusion, or cite any evidence showing that Plaintiff meets Listing 9.00.

3 The ALJ specifically addressed Listings 9.00, 12.04, and 1206, *inter alia*, and explained  
4 why he found that Plaintiff did not satisfy the requirements of those listings. (AR 18-20.) Plaintiff  
5 offers her own interpretation of the record, regarding whether her deficits in social functioning  
6 and/or her ability to maintain concentration, persistence, and pace should have been considered  
7 “moderate” or “marked,” but simply offers her own analysis of the same evidence discussed by  
8 the ALJ. Dkt. 10 at 7-9. She has not shown that the ALJ’s findings regarding these criteria were  
9 unreasonable, and thus has not shown error in the ALJ’s decision with respect to Listings 12.04 or  
10 12.06.

11 Neither does Plaintiff address the content of Listing 9.00, which provides that limitations  
12 caused by endocrine disorders should be considered with respect to the body system they impact,  
13 rather than as separate endocrine disorders alone. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.00.  
14 Thus, although Plaintiff emphasizes her dispute with the ALJ’s finding that her diabetes “appears  
15 controlled[,]” she has not argued that her diabetes caused any listing-level limitations in any  
16 particular body system. *See* Dkt. 14 at 1. Although neither party notes this in briefing,<sup>2</sup> the ALJ’s  
17 decision appears to refer to an obsolete version of Listing 9.00 that was replaced in 2011. *Compare*  
18 Programs Operations Manual System DI 34129.011, *available at*  
19 <https://secure.ssa.gov/poms.nsf/lnx/0434129011> (last accessed March 9, 2018) *with* 20 C.F.R. Pt.  
20 404, Subpt. P, App. 1, § 9.00; *see also* Revised Medical Criteria for Evaluating Endocrine  
21 Disorders, 76 FR 19,692 (Apr. 8, 2011). Because the ALJ explicitly considered whether Plaintiff

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22 <sup>2</sup> The Commissioner’s brief mentions the current version of Listing 9.00, but does not address the  
23 discrepancy between the ALJ’s findings and the current version of the listing. Dkt. 11 at 13.

1 satisfied requirements that were not actually in place at the time of the decision, and this case must  
2 be remanded on other grounds as explained *infra*, the ALJ should on remand address whether  
3 Plaintiffs meets the applicable version of Listing 9.00.

4 Subjective symptom testimony

5 The ALJ discounted Plaintiff's subjective complaints for a number of reasons, including  
6 (1) the lack of corroboration for her complaints in the objective medical record, (2) daily activities  
7 inconsistent with disabling limitations, and (3) her failure to follow through with treatment  
8 recommendations and failure to consistently seek treatment. (AR 22, 28.)

9 Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth  
10 Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). The Court agrees. The ALJ  
11 simply summarized the objective medical record, without explaining how that evidence  
12 undermined Plaintiff's testimony. (AR 22-25.) This reasoning is not sufficiently specific. *See*  
13 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493-94 (9th Cir. 2015) (ALJ failed to provide specific  
14 reasons, allowing for meaningful review where "she simply stated her non-credibility conclusion  
15 and then summarized the medical evidence supporting her RFC determination").

16 The ALJ also failed to explain how the cited activities either contradicted Plaintiff's  
17 testimony or demonstrated the existence of transferable work skills. (AR 28.) Plaintiff's ability  
18 to spend time with her children, engage in hobbies, cook, and use public transportation is not  
19 reasonably inconsistent with her descriptions of limitations caused by her seizure disorder,  
20 diabetes, or mental conditions, and the ALJ did not identify any contradiction. Accordingly, the  
21 ALJ's reasoning with respect to Plaintiff's activities is invalid. *See Orn v. Astrue*, 495 F.3d 625,  
22 639 (9th Cir. 2007) (activities may undermine credibility where they (1) contradict the claimant's  
23 testimony or (2) "meet the threshold for transferable work skills").

1           Lastly, although the ALJ found that Plaintiff's lapse in treatment between June 2014 and  
2 April 2015 was unexplained (AR 28), Plaintiff testified at the hearing that during that period she  
3 was living on her own in subsidized housing (as opposed to the domestic violence shelters she  
4 lived in before and after that time period), and that her move there had disrupted her treatment  
5 relationships. (AR 47-66.) The ALJ did not mention Plaintiff's explanation or address why he  
6 found Plaintiff's explanation to be unreasonable, as he should have done under Social Security  
7 Ruling (SSR) 16-3p. *See* 2017 WL 5180304, at \*10 (Oct. 25, 2017) ("[W]e will consider and  
8 address reasons for not pursuing treatment that are pertinent to an individual's case.").

9           Although the ALJ also cited evidence that Plaintiff did not always comply with treatment  
10 recommendations pertaining to her seizure disorder and diabetes (AR 28), which does support the  
11 ALJ's discounting Plaintiff's complaints to some extent, this reason is unconnected to Plaintiff's  
12 allegations of mental limitations and therefore cannot alone support the ALJ's determination  
13 regarding Plaintiff's subjective testimony. Accordingly, the errors contained in the ALJ's  
14 reasoning are not harmless, and the ALJ should reconsider Plaintiff's subjective testimony on  
15 remand.

16           The ALJ should also reconsider Plaintiff's RFC assessment on remand, in light of a new  
17 assessment of her subjective testimony and Dr. Wilson's opinion (as discussed *infra*). Specifically,  
18 the ALJ did not address Plaintiff's allegations regarding the limitations caused by her seizure  
19 disorder; the ALJ focused on the evidence regarding whether Plaintiff's seizures were epileptic in  
20 nature (AR 22-25), but did not detail whether he credited her testimony that she experienced three  
21 or four seizures per week, and that these seizures cause her to be sleepy and disoriented afterward.  
22 The ALJ's RFC assessment is not necessarily consistent with seizures this frequent or this severe.  
23 On remand, the ALJ shall explicitly assess Plaintiff's testimony regarding her seizure activity and

1 related limitations.

2 Medical opinions

3 Plaintiff argues that the ALJ erred in assessing opinions provided by a treating physician,  
4 a consultative examiner, and State agency consultants. The Court will address each challenged  
5 opinion in turn.

6 In general, more weight should be given to the opinion of a treating physician than to a  
7 non-treating physician, and more weight to the opinion of an examining physician than to a non-  
8 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted  
9 by another physician, a treating or examining physician's opinion may be rejected only for "clear  
10 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).  
11 Where contradicted, a treating or examining physician's opinion may not be rejected without  
12 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."  
13 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ may reject  
14 physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting  
15 clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157  
16 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating  
17 her conclusions, the ALJ "must set forth [her] own interpretations and explain why they, rather  
18 than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

19 Dr. Wilson

20 Dr. Wilson began treating Plaintiff in May 2015, and signed a declaration in October 2015  
21 stating that she reviewed Plaintiff's records back to 2008 (when Plaintiff began treatment at Dr.  
22 Wilson's clinic). (AR 1022-23.) Dr. Wilson opined that Plaintiff has not been capable of working  
23 full-time since January 7, 2014, "due to her constellation of medical and mental health



1 impairments.” (AR 1023.)

2 The ALJ gave “reduced weight” to Dr. Wilson’s opinion, finding that Dr. Wilson had  
3 misled the reader into believing that she had read more records than are in the administrative  
4 record. (AR 27.) This reason is non-sensical: that the administrative record contains no evidence  
5 before July 2013 does not show that Dr. Wilson could not have reviewed earlier records. The  
6 Commissioner does not defend this reason, and the Court finds that it is not a specific, legitimate  
7 reason to discount Dr. Wilson’s opinion.

8 The ALJ also found that Dr. Wilson’s opinion did not explain how Plaintiff met Listing  
9 9.00, and that the medical record contradicted that opinion. (AR 27.) As explained *supra*, the ALJ  
10 appears to have been considering an obsolete version of Listing 9.00, and therefore this reason  
11 requires reconsideration in light of the current version of Listing 9.00.

12 Lastly, the ALJ found that Dr. Wilson’s brief treatment relationship (10 visits between May  
13 and October 2015) suggested that the opinion would “not merit the same weight that would be  
14 given to a treating physician with a treating relationship of a longer duration.” (AR 28.) That may  
15 be true, but the record does not contain an opinion from a treating physician with a treating  
16 relationship of a longer duration, and therefore this reason does not support the ALJ’s discounting  
17 of Dr. Wilson’s opinion, because he did not discount it in favor of an opinion written by a provider  
18 with a lengthier relationship.

19 Because the ALJ did not provide specific, legitimate reasons to discount Dr. Wilson’s  
20 opinion, the ALJ shall reconsider this opinion on remand and either credit it or provide legally  
21 sufficient reasons to discount it.

22 Amritha Bhat, M.D.

23 Dr. Bhat examined Plaintiff in April 2014, and concluded that Plaintiff had no

1 psychological limitations, but “would benefit from a detailed medical evaluation to assess the  
2 contribution from pain.” (AR 615-19.) The ALJ gave great weight to Dr. Bhat’s opinion. (AR  
3 26.)

4 Plaintiff argues that the ALJ’s reasons for crediting Dr. Bhat’s opinion are not specific and  
5 legitimate and supported by substantial evidence, but this is the incorrect standard. An ALJ must  
6 explain why he or she *rejects* an opinion, but Plaintiff has cited no authority requiring an ALJ to  
7 provide reasons to *credit* an opinion, and the Court is aware of none. *See* SSR 96-8p, 1996 WL  
8 374184, at \*7 (Jul. 2, 1996) (“If the RFC assessment conflicts with an opinion from a medical  
9 source, the adjudicator must explain why the opinion was not adopted.”). Plaintiff has not shown  
10 that the ALJ erred in crediting Dr. Bhat’s opinion.

#### 11 State agency opinions

12 Plaintiff argues that the ALJ erred in assigning great weight to the State agency opinions  
13 because there is evidence in the record that is inconsistent with those opinions and because the  
14 State agency consultants never examined Plaintiff. Dkt. 10 at 12-13. Plaintiff has not identified  
15 an error in the ALJ’s assessment of those opinions because “the report of a nonexamining,  
16 nontreating physician need not be discounted when it ‘is not contradicted by *all other evidence* in  
17 the record.’” *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting *Magallanes*, 881  
18 F.2d at 752 (emphasis in original)). Plaintiff has not shown that the State agency opinions were  
19 inconsistent with the remainder of the record, and the Court declines Plaintiff’s invitation to  
20 reweigh the evidence in her favor. Dkt. 10 at 12-13.

21 Plaintiff also argues that the ALJ erred in failing to obtain an opinion regarding her physical  
22 functioning from a treating or examining physician (Dkt. 10 at 13), but this argument overlooks  
23 Dr. Wilson’s declaration. Furthermore, none of the cases cited by Plaintiff in support of this

1 argument are binding on this Court. Dkt. 10 at 13. On remand, the ALJ is not precluded from  
2 ordering a consultative examination, but Plaintiff has not shown that the ALJ breached his duty to  
3 develop the record in failing to obtain one because the record as currently constituted is neither  
4 ambiguous nor inadequate. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)  
5 (“Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to allow for proper  
6 evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an appropriate inquiry.’”).

#### 7 Lay testimony

8 Plaintiff’s daughter, Angelina Grant, provided two written statements describing Plaintiff’s  
9 symptoms and limitations. (AR 336-43, 399-400.) The ALJ noted that Ms. Grant was not  
10 medically trained, but said that he gave “some weight” to her statements to the extent they were  
11 consistent with the RFC assessment. (AR 27.)

12 Plaintiff argues that the ALJ erred in first assessing her RFC, and then considering whether  
13 Ms. Grant’s statements were consistent with that assessment. Dkt. 10 at 16. She also contends  
14 that Ms. Grant’s lack of medical training is not a reason to discount her statements. *Id.*

15 The Court agrees that Ms. Grant’s status as a layperson is a not a germane reason to  
16 discount her statements. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996).  
17 Nonetheless, Plaintiff has not shown that the ALJ’s RFC assessment is in fact inconsistent with  
18 Ms. Grant’s statements, and therefore has not shown that any harm resulted from the ALJ’s  
19 erroneous assessment of Ms. Grant’s statements. Because this case must be remanded for other  
20 reasons, and the ALJ may reformulate Plaintiff’s RFC assessment, the ALJ may need to reconsider  
21 Ms. Grant’s statements on remand and, if necessary, explain why they were discounted.

#### 22 CONCLUSION

23 For the reasons set forth above, this matter is REVERSED and REMANDED for further

1 administrative proceedings.

2 DATED this 20th day of March, 2018.

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6 Mary Alice Theiler  
United States Magistrate Judge  
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